United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,746

SEPTEMBER TERM 1970
Criminal 723-70

United States of America

v.

Curtis Nere,
Appellant

APPELLANT'S BRIEF

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this court for appellant

TABLE OF AUTHORITIES

Statutes and Other Authorities

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ISSUES PRESENTED FOR REVIEW

1. Where the defendant's case showed that he had committed only larceny, did the District Court err in refusing to charge the jury in a case in which defendant was charged with, inter alia, robbery, that it could convict defendant of the lesser included offense of larceny?

2. Did the procedure by which the accused was tried before the same judge who presided when his co-accused pleaded guilty violate the Due Process Clause of the Fifth Amendment?

3. Did the District Court err in refusing to include in its charge to the jury the missing witness instruction as to witnesses to the offense other than the complainant?

4. Did the District Court err in permitting the jury to take a copy of the indictment into the jury room?

5. Did the prosecutor improperly argue to the jury so as to deny appellant a fair trial?

Except for this Court's consideration of defendant's motion for release pending appeal, the pending case has not been previously before this court under the same or similar title or in any manner whatever.

II.

REFERENCES TO RULING

The decision of Judge Sirica, the District Judge, refusing to charge the jury that it could convict defendant of the lesser included offense of larceny (the basis for the first issue presented for review) appears at Transcript of Proceedings of July 7-8, 1970 [hereinafter referred to as Transcript of Trial], pp. 89-91. The decision of the District Judge refusing to give the jury the missing witness instruction (the basis for the third issue presented for review) appears at Transcript of Trial, pp. 106-07.

There are no rulings to which appellant objects as to the second, fourth and fifth issues presented for review.

III.

STATEMENT OF THE CASE

Curtis Nero, the appellant, and Kenneth Goldsmith were arrested on February 26, 1970, in the District of Columbia and charged with a robbery that allegedly took place at a sandwich shop in Southeast Washington earlier that night. Sometime thereafter, the Grand Jury for the United States District Court for the District of Columbia indicted both Nero and Goldsmith on three counts: armed robbery, robbery, and assault with a dangerous weapon.

On June 5, 1970, Goldsmith pleaded guilty before Judge Sirica to the count of robbery, which plea Judge Sirica accepted. Transcript of Proceedings of June 5, 1970.

On July 7 and 8, 1970, appellant Nero was tried before Judge Sirica on all three counts. The jury found appellant guilty both of armed robbery and of assault with a dangerous weapon. Pursuant to the court's instructions, having found appellant Nero guilty of armed robbery, it disregarded the robbery count. Transcript of Trial.

On July 17, 1970, Nero's counsel below filed a Motion for Judgment of Acquittal or in the Alternative for a New Trial, which Motion Judge Sirica denied without opinion on July 29, 1970.

On September 11, 1970, Judge Sirica sentenced Goldsmith to one to six years on the robbery count to which he had

pleaded guilty. On September 23, 1970, Judge Sirica sentenced Nero to three to ten years for armed robbery and two to six years for assault with a dangerous weapon, said sentences to be served concurrently.

On September 29, 1970 Nero noticed his appeal from his conviction to this Court. The conviction appealed from is a final decision of the District Court of which this Court has jurisdiction under 28 U.S.C. §1291.

IV.

STATEMENT OF FACTS

Appellant Nero's arrest and conviction arose from his part in the events that took place at the Miles Long Sandwich Shop, 1208 Maple View Pl., S.E., Washington, (Miles Long) late on the night of February 26, 1970. Aside from a few arrests and modest fines for disorderly conduct, Nero, age 26 and then owner of a shoe repair concession, had never run afoul of the law.

At his trial, Nero admitted going to Miles Long with Kenneth Goldsmith on the night in question, leaving with Goldsmith, and thereafter accepting from Goldsmith some sixty dollars which Goldsmith procured while at Miles Long. Nero testified as follows: He met Goldsmith earlier that night. While the two men were driving in Nero's car, Goldsmith proposed a knife robbery. Nero refused to participate in any such crime. Goldsmith then proposed that Nero accompany him to Miles Long, where both men were known and where, Goldsmith said, he could persuade the counter girl to give him money from Miles Long and then inaccurately describe the two men to the police. Goldsmith's plan was that he would do all the talking and that Nero would stand with a stick inside his coat to resemble a gun to make the "hold-up"

look authentic to any other employees or any customers then in the sandwich shop. Nero picked up a stick near Miles Long, put it inside his coat, and went into the shop with Goldsmith. While Goldsmith went behind the counter to the back of the shop with the counter girl in charge of the shop, Nero testified that he stood passively in the shop. After Goldsmith emerged from the back, the two left Miles Long. Goldsmith then told Nero that the countergirl had given him some money and that she would wait a short time before reporting the crime and giving an inaccurate description of the culprits to the police. Goldsmith then gave Nero about one-half of the money, approximately sixty dollars. Transcript of Trial, pp. 80-86.

The government's case rested mainly on the testimony of the countergirl, Henrietta Patten, which contradicted Nero's account of the events inside Miles Long in several significant respects. She testified that once she let the men into the shop, Goldsmith came through a gate at the counter behind the counter and told her that this was a stick-up. As she knew Goldsmith well, she told him that he must be kidding. Goldsmith said that he was not playing and that Nero was carrying a gun. While she was putting the money from the cash register into a bag and before she emptied the safe, Nero turned around, displayed a sawed-off shotgun and announced that if anyone

present said anything, he would kill them. Miss Patten said that she set off an alarm inside the cash register as she was emptying it and that she described the two men to the police when the police arrived a few minutes later. Transcript of Trial, pp. 5-9. Although several other people, waitresses and patrons, were present during these events, and their testimony may have resolved the sharp conflict between the two versions of the events recited above, the United States called no witnesses other than Miss Patten and those police officers who participated in the investigation of the crime, and Nero's counsel below did not seek out these other witnesses until after the trial, by which time he was unable to find them.

After Nero's testimony described above, his counsel asked the court to instruct the jury that one of its alternatives was to convict Nero of larceny, a lesser included offense of robbery. In doing so, he told the court that Nero's theory of the case was that he had committed a crime, but that that crime was not robbery or armed robbery. Counsel described Nero's theory as that his intent was to engage in a "phony" robbery, to take money under false pretenses. As such, he never put Miss Patten in fear and never offered any force or violence such that his felonious taking could constitute robbery. Transcript of Trial pp. 89-90. The court below re-

fused to give the lesser included offense instruction saying "I can't go along with that on the evidence. I think the evidence indicates pretty strongly, frankly, both went in with the intent to rob." The Court said that it saw that the only issue for the jury in the case was whether the robbery was in fact armed. Transcript of Trial, pp. 90-91. When the District Judge charged the jury, he made no mention of larceny or the jury's power to convict of a lesser included offense. Transcript of Trial, pp. 108-130.

Nero's counsel below also asked the Court to give the jury the missing witness instruction as to the witnesses to the crime other than Henrietta Patten. The Court refused on the ground that these witnesses were equally available to Nero. Transcript of Trial, pp. 106-07.

V.

ARGUMENT

A.

The Court Below Erred in Refusing to Charge the Jury that It Could Convict Nero of a Lesser Included Offense.

Appellant Nero requested that the Court instruct the jury that he could be convicted of the lesser offense of larceny, which charge the Court, after first indicating that it might give the charge, then refused to give. Transcript of Trial, pp. 89-91, 108-130. It is clear that at a defendant's request, a court must charge a jury that it can convict the defendant of an offense less than that with which he is charged but included therein unless the evidence will not support conviction of that lesser offense. As stated by this Court:

> "Where there is evidentiary support for special facts sustaining a rational defense theory, to which the court's attention is specifically directed, the defendant is entitled to have the jury charged on that theory. However weak the evidence, however implausible the theory may appear to be, the matter is for the jury's determination." (footnotes omitted.) Brooke v. United States, 128 U.S. App. D.C. 19, 385 F.2d 279, 284 (1967).

Federal Rule of Criminal Procedure 31(c) permits a jury to find a defendant guilty "of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if

the attempt is an offense." The defendant may avail himself of the Rule by right, see United States v. Comer, ___U.S. App. D.C.___, 421 F.2d 1149 (1970); Kelly v. United States, 125 U.S. App. D.C. 205, 370 F.2d 227 (1966), cert. denied 388 U.S. 913 (1967), and is entitled to the requested charge when:

> "Thus, '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.' Berra v. United States, supra, 351 US at 134, 100 L ed at 1017 . . . . the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra." (footnotes omitted.) Sansone v. United States, 380 U.S. 343, 349-50 (1965).

This Court recently characterized this formula as meaning that "lesser included offenses may be charged when the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. The jury is not given carte blanche to find the defendant guilty of only the lesser offense when such guilt necessarily establishes guilt of the greater offense." Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199, cert. denied 393 U.S. 1120 (1968).

Of course, the evidence must give some support to a conviction of the lesser offense, but this evidence may be

"weak". Only "some evidence" is necessary. United States v. Comer, supra, 421 F.2d at 1154.[1/]

Larceny is an offense included in robbery. The elements of larceny and of robbery are not identical. Larceny, whether grand or petit, is a felonious taking of property. D.C. CODE §§22-2201, 22-2202. Robbery is a felonious taking of property "by force or violence . . . or by putting in fear." D.C. CODE 22-2901. One who wrongfully takes property from another without force or threat of force is guilty only of larceny. One who wrongfully takes the same property but by force or threat of force is guilty of robbery. "It is beyond dispute that larceny is a necessarily lesser included offense of the crime of robbery." Walker v. United States, 135 U.S. App. D.C. 280, 418

1/ In evaluating the evidence to determine if it can rationally support defendant's lesser offense theory, this Court has made clear that the trial judge may not restrict himself to assuming that defendant's story is wholly accurate. In Broughman v. United States, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966), the court held that one charged with robbery was entitled to a lesser offense charge of simple assault, even though this required the court to believe defendant when he denied taking any money from the victim but disbelieve him when he denied attacking her. See also, Young v. United States, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); Fuller v. United States, supra, 407 F.2d at 1229; Belton v. United States, 127 U.S. App. D.C. 201, 382 F.2d 150, 155 (1967).

F.2d 1116 (1969). See also, Lamore v. United States, 78 U.S. App. D.C. 12, 135 F.2d 766 (1943); Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963). As required by Kelly v. United States, supra, "all the elements of the lesser offense . . . are also elements of the greater offense"--- as they were not in Kelly. 370 F.2d at 228.

Nero's theory is clearly supported by the evidence. Nero's testimony constitutes the elements of larceny: the felonious taking of property of Miles Long. As Nero thought Henrietta Patten was an accomplice, the taking he described was by false pretenses and not by force or threat of force. As such, if a jury properly instructed that it could convict Nero of larceny believed him, it could quite rationally convict him of larceny.[2/] Surely no such verdict could be rejected as irrational. If the jury believed Nero but not Miss Patten, it could find him guilty only of larceny. Indeed, the jury could believe some of the testimony of Henrietta Patten and still accept Nero's theory. For example, in convicting Nero of armed robbery, it may have believed that Nero carried and brandished a gun

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2/ Unlike the defendant in Richardson v. United States, 131 U.S. App. D.C. 168, 403 F.2d 574 (1968), Nero never admitted a taking by force that would necessarily defeat a request for a charge as to larceny. In fact, he consistently and adamently denied the use of any force or threat of force (Transcript of Trial, pp. 84-86, 97-102.)

to make the phony robbery look real to the others in the sandwich shop, but that in doing so he never offered or threatened any force to the "victim," Miss Patten, that caused her to surrender the money. In such an instance, the jury would believe all of Nero's testimony except his denial of having a gun and believe that part of Miss Patten's testimony that placed him with a gun. As already noted, the lesser offense charge is mandatory not just when supported if the jury believes all of defendant's testimony. Rather, it is mandatory if the evidence taken as a whole can reasonably support the inferences drawn by defendant's theory -- even if that theory requires the jury to disbelieve the defendant or to believe prosecution witnesses in some respects.

The Court below's failure to charge the jury on larceny was especially prejudicial to Nero. Nero admitted on the stand that he had taken money wrongly; in fact, his counsel admitted that Nero committed the crime of larceny (Supp. Tr. at pp. P-Q.) The entire strategy adopted by counsel below was obviously pitched to get a verdict of acquittal on the robbery and armed robbery charges in favor of a verdict of guilty of larceny. Despite the warnings of the trial judge and the prosecuting attorney as to the obvious prejudice to Nero, defense counsel below insisted that the jury be apprised that the co-perpetrator of the crime had pleaded guilty to robbery. (Tr.

37-41). Even if the trial court were to instruct on larceny as a lesser included offense, the wisdom of the course of action was dubious; without such an instruction it was suicidal as it offered the jury only the choice of convicting Nero of the greater crime or of setting free a defendant whose own lawyer convicted him of larceny and whose co-defendant, they were informed, had confessed guilt of robbery. In other words, without instruction, the jury could not fully understand that to believe Nero was to find him guilty not of robbery, but of larceny. If the jury believed Nero, it could either shrug its shoulders and convict him of the greater offense or it could let him off without any punishment for his admittedly criminal behavior. Like the defendant charged with robbery and assault in Walker v. United States, supra, Nero testified to taking money unlawfully. As this Court sustained the giving of a larceny charge not requested by Walker there, so this Court should order that charge as requested by Nero here. The charge given by the Court below is defective much as was the charge rejected in Greenfield v. United States, 119 U.S. App. D.C. 278, 341 F.2d 411 (1964). This Court there noted that the instruction "together with the denial of an instruction on simple assault may well have caused members of the jury to conclude that the assault was with a dangerous weapon, when they might have concluded otherwise if permitted to do so without acquitting appellant." 341 F.2d at 412-13. (Emphasis added).

B.

That Nero Was Tried Before the Same Judge Who Presided When His Co-Accused Pleaded Guilty Violates the Due Process Clause of the Fifth Amendment.

The situation facing an accused whose co-defendant has pleaded guilty and had that plea accepted by the judge hearing his trial is one fraught with dangers forbidden by the Due Process Clause. The accused does not likely know in what respects his co-defendant may have testified. By confessing, the co-accused may have named or otherwise implicated the accused in the crime as to which he has not yet been adjudged. The co-accused may have told the judge that the accused was the main culprit, the ringleader, that he carried a weapon, that he used force or coercion. In short, the co-accused may have made unrebutted statements reflecting adversely on the absent accused. Whatever effect these statements have on the judge, they constitute matter in the nature of evidence not in the record of which the accused does not know and which he cannot confront.

In reversing convictions for contempt and perjury made by a judge who had charged the defendants with these crimes in the course of his conducting a one-man grand jury, the Supreme Court set the standard by which to judge the propriety of a trial:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 US 510, 532, 71 L ed 749, 753, 47 S Ct 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 US 11, 99 L ed 11, 75 S Ct 11." In re Murchison, 349 U.S. 133, 136 (1955)

That the trial judge who has presided over a co-defendant's hearing might be able to ignore what he has heard there when he is presiding at the trial of the accused is not in point. As the Murchison Court noted in a context similar to that of this case:

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his "grand-jury" secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." 349 U.S. at 138.

And, even if the judge could ignore what he had heard -- or if the co-defendant had said nothing adverse to the accused, the procedure should not be permitted. As the accused does not know what occurred at the prior hearing, to do otherwise is to fail "to prevent even the probability of unfairness" and to fail to "satisfy the appearance of justice" required by Murchison.

Twice in recent years the Supreme Court has found reversible error in procedures whereby statements of a co-accused were formally admitted into evidence in the trial of the accused. Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968).

The present case poses an abuse of the criminal process more pervasive than those the subject of Supreme Court disapproval in Barber and Bruton. As inadequate as were the means available to either of them to rebut the offensive statements, at least they knew what those statements were, what they were up against. The statements made against them were part of their trials, not outside the record. The accused who seeks a trial when his co-accused has pleaded guilty probably does not know what was said about him or his actions to his judge at the co-accused's hearing.

To be certain, the statements at the prior hearing are not introduced in evidence at the accused's trial. If the trial is by jury, they will not even be known to the trier of fact. However, that the judge will be cognizant of them is prejudice enough. The danger that these statements will color the judge's view of the accused's case and, even if subconsciously, affect his exercises of judgment both in the conduct of the trial and in sentencing, if the accused is found guilty, is sufficient reason to prohibit his knowing of those statements. A simple declaration by this Court that where one co-defendant pleads guilty, the trial of the second defendant be assigned to another judge would eliminate this danger. It would eliminate the possibility of subtle prejudgment and perhaps forestall reversals for errors committed because the judge's view of accused had been indelibly stamped by prior statements in another proceeding.

As this Court said in a discussion of the judge's role in plea bargaining relevant to the attack here on another aspect of the pre-trial criminal process:

> "If inducements are to be offered for guilty pleas, there are strong reasons why the court should not be the party to offer them. The trial judge may sacrifice his ability to preside impartially at trial by becoming too involved with pre-trial negotiations. Even if he does not, it may so appear to the defendant.

> It is important not only that a trial be fair in fact, but also that the defendant believe that justice has been done." **Scott** v. United States, 136 U.S. App. D.C. 377, 419 F.2d 264, 273 (1969).

It appears that the involvement of the Judge below with Goldsmith (the co-perpetrator) may have sacrificed his ability to preside impartially at Nero's trial. The record in this proceeding indicates that the Judge below was indeed affected by what he heard at the hearing of Nero's co-accused, Goldsmith. The Court accepted Goldsmith's plea of guilty to armed robbery on June 5, 1970, about one month before Nero's trial. Before accepting Goldsmith's plea, the court asked him to describe the commission of the crime which he was admitting. Goldsmith's brief testimony contradicted Nero's in several important respects -- including Nero's denial that he had a gun and, implicitly at least, Nero's assertion that the "robbery" was a put-on, a phony robbery that involved no element of coercion. The Court's questions after Goldsmith described the crime indicated that something, perhaps Goldsmith's testimony, made the Court hostile to Nero and to the defenses he raised at his trial before that trial began. Thus, although all agree that Goldsmith is the one who announced the "hold-up," the Court asked Goldsmith questions such as "Did you take part in that robbery with him?"; "You knew he was going to rob

her?"; and "When did you make up your mind to join in the robbery?" (Emphasis supplied.) Transcript of Proceedings of June 5, 1970, pp. 4-6.[1] And, at Nero's trial, in refusing to give the jury the lesser included offense charge discussed in Part V-A, supra, the Court showed its disbelief of Nero by stating: "I think the evidence indicates pretty strongly, frankly, both went in with the intent to rob." Transcript of Trial, pp. 90-91.

There is a reason distinct from the demands of due process and fairness for severing judges in cases like the present one. That reason is differential sentencing. When two defendants are jointly indicted and when one pleads guilty and the other is found guilty after insisting on a trial, the defendant who exercised his right to a trial frequently receives a greater sentence than his cohort who waived that right. Although judges rarely state that they are imposing a greater sentence on the defendant who pleaded innocent because he demanded a trial, such is thought often to be the case. And, whether or not such differential sentencing is

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[1] Both the court and the United States Attorney made a point of Goldsmith's quickly turning himself and the stolen money in, Transcript of Proceedings of June 5, 1970, p. 10 -- a contrast to Nero's behavior raised at his trial by the United States Attorney. Supplemental Transcript of Proceedings of July 7, 8, 1970, p. H.

in fact so motivated, many defendants think that it is. Thus, every time a judge who has heard one defendant plead guilty and another innocent sentences the one convicted at a trial to a greater sentence, he, albeit perhaps inadvertently, reinforces this belief that a defendant must pay a severe price to exercise his right to a trial.

Judge Bazelon's opinion in Scott v. United States, supra, 419 F.2d at 269-75, makes clear that a judge cannot constitutionally announce a policy of differential sentencing. Yet, judges rarely announce either a general policy of differential sentencing or its specific use in a particular case. The judge who heard Nero's case (Judge Sirica) is the same judge who sat in Scott's trial. Although he made no statements in sentencing either Nero or Goldsmith to indicate directly that he was engaging in differential sentencing, he did give Nero a considerably stiffer term than Goldsmith, yet calling Nero's sentence "a moderate sentence in this type case." Transcript of Proceedings of September 23, 1970, p. 3. [2/] As the District Judge had previously announced the policy repudiated in Scott,

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2/ Nero was sentenced to serve three to ten years for armed robbery, two to six for assault with a dangerous weapon, the sentences to run concurrently. Goldsmith received a sentence of one to six years for the robbery charge to which he pleaded guilty.

one cannot but wonder why he imposed these sentences in this case.[3] If the answer is differential sentencing, Nero's sentence is improper -- even though there is no statement of the Judge articulating the reasons for the sentence which can be the basis of reversal.[4] If different judges had heard Goldsmith and Nero, the problem would not arise. So long as the second judge did not know the nature of the sentence of the defendant who pleaded guilty, there would be no more differential sentencing, no more troublesome searches for a judge's motives and for statements that reveal them.

3/ At sentencing, Goldsmith said he was sorry, Transcript of Proceedings of September 11, 1970, pp. 1-2 -- an element previously regarded as very important in sentencing by this judge. See Scott v. United States, supra, 419 F.2d at 267. Nero made no such ritual recantation, no statement whatever. Transcript of Proceedings of September 23, 1970, p. 2.

4/ A further indication of differential treatment is the Court's treatment of the two accused's requests for bond after conviction and pending sentence. Although the Court revoked Nero's bond, Transcript of Trial p. 131, it earlier had permitted Goldsmith to remain free on personal bond. Transcript of Proceedings of June 5, 1970, p. 10.

C.

The Court Below Erred in Refusing to Give the Jury the Missing Witness Instruction As to Witnesses to the Offense Other Than the Complainant.

At the time of the robbery of which Nero was convicted, there were several waitresses and customers present in the sandwich shop. Although the police arrived at the scene of the crime within minutes of its occurrence and although at least some of these witnesses were in the shop when the police arrived, Testimony of Officer Stanley Hardesty, Transcript of Trial, pp. 50-51, the prosecution called none of these witnesses. The only eye-witness it called was Henrietta Patten, the countergirl apparently in charge of the premises at the time of the crime. Although Nero's counsel below asked the Court to give the jury the missing witness instruction, it refused to do so. Transcript of Trial, pp. 106-07.

Long ago, the Supreme Court stated that the missing witness instruction is appropriate in a criminal case when a party fails to call a witness more readily available to him than to the other side if his testimony would bear on the party's case:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate

> the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." Graves v. United States, 150 U.S. 118, 121 (1893).

A witness' testimony will "elucidate the transaction" when the witness is important to the party's case, his testimony would be non-cumulative, and his testimony would be superior to other testimony on the matter. See Brown v. United States, 134 U.S. App. D.C. 269, 414 F.2d 1165, 1166-67 n.2 (1969).

In this case, production of the waitresses and customers in the sandwich shop was peculiarly within the power of the prosecution. The police came upon them at the scene of the crime, which they then investigated, minutes after its commission. If their investigation was anything short of grossly negligent, they should have questioned and taken the names of these witnesses. Thus, the prosecution knew or should have known their names and addresses so that they might call them. The defense did not have the prosecution's advantage of an on-the-spot investigation.[1/]

The testimony of these witnesses would "elucidate the transaction." Surely, any witnesses who could corroborate Henrietta Patten's assertion, contradicted by Nero, that Nero had a gun would be important to the prosecution. Although such testimony would be corroborative, it would be

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1/ In fact, Nero's counsel below apparently made no effort to locate these witnesses until after the trial. At that time, he found their trail cold and was unable to find any of them.

non-cumulative and superior to other testimony in that the prosecution would normally seek some support for Miss Patten's disputed story. For the prosecution to call only one witness to a robbery, at least some of the elements of which were in dispute, when several others witnessed the crime is highly unusual indeed. And, even if this Court should find the witnesses equally available to both sides, it should reverse and order the court below to give the instruction: If a witness' presence is a natural part of a party's case, the jury is entitled to hear the missing witness doctrine explained, at least by counsel, even if the witness is physically accessible to both parties. See United States v. Jackson, 257 F.2d 41, 43-44 (3d Cir. 1958).

D.

The Court Below Erred in Permitting the Jury to Take a Copy of the Indictment into the Jury Room.

At the beginning of his charge to the jury, the District Judge told the jury that it would take a copy of the indictment returned by the grand jury in this case into the jury room. Transcript of Trial, p. 108. He explained that the indictment is not evidence and then based much of his charge on that indictment. Transcript of Trial, pp. 108-30, passim. The indictment, which appears in the record, charges both Curtis Nero and Kenneth Goldsmith with armed robbery, robbery, and assault with a dangerous weapon.

Although courts have generally permitted a jury to take the indictment into its deliberations, see, e.g., United States v. Marquez, 424 F.2d 236 (2d Cir. 1970); Shayne v. United States, 255 F.2d 739 (9th Cir.), cert. denied 358 U.S. 823 (1958), there is no reason to do so. The indictment is only the complaint instituting the criminal action. It is not probative and cannot be used as evidence. And, while it has no positive value to aid the jury in its deliberations, it may be prejudicial to the defendant. By providing graphic illustration that the grand jury saw fit to indict the accused, the indict-

ment may persuade the jury that it is more than the mere charge that it is. As such, permitting the jury to see it may undermine the presumption of innocence. As there is no reason at all for permitting the jury to see it, it is clear that, on balance, it should be kept out of the jury room.

Allowing the jury to read the indictment charging two defendants in a case where only one is on trial is especially prejudicial. The presence of the indictment in a case like the present one continually raises in the jury's mind the question of what has happened to the co-accused. Where he has been acquitted, failure to tell the jury that would be obviously prejudicial. Where he has been convicted or has pleaded guilty, as here, the constant reminder of the co-accused can only harm the defendant. Indeed, even charging the jury that it is to ignore the references to the co-accused might well be insufficient protection to the accused. See Marcus v. United States, 422 F.2d 752 (5th Cir. 1970); United States v. Hoffa, 367 F.2d 698, 713 (7th Cir. 1960), vacated on other grounds, 387 U.S. 231 (1967). And, where, as here, the jury knows that the co-accused has pleaded guilty, the indictment's reminder of that fact can only cloud the jury's judgment. Thus, when the jury read the indictment in the present case, its references to the co-accused, Goldsmith, cemented

in the juror's minds the fact that Nero's counsel below had, with apparent faulty judgment, insisted that the jury be informed that Goldsmith had pleaded guilty. Transcript of Trial, pp. 37-41.

E.

Nero Was Denied a Fair Trial Because the Prosecutor Improperly Argued to the Jury.

The ultimate issue presented to the jury in this case was whether to believe Henrietta Patten or to believe Curtis Nero, the appellant. In two respects, the prosecutor improperly argued to the jury in seeking to persuade it that it should not believe Nero.

First, the prosecutor argued that Nero was the ringleader of the offense and based that argument on facts contrary to the record. When Nero was arrested he had sixty-nine dollars on his person. One hundred and thirty-six dollars were taken from Miles Long. Although Nero testified that he had about fifteen or twenty dollars of his own in his pocket before he entered Miles Long, Transcript of Trial, p. 97, and although the government introduced no contradictory evidence, the prosecutor twice argued to the jury that Nero was probably the ringleader because he received sixty-nine dollars, or over half of the proceeds of the crime. In his closing argument, the prosecutor argued as follows:

> "... what this evidence indicates that Mr. Nero participated in this robbery not only did he participate, from the evidence you can probably draw the inference that he was probably the leader of the robbery attempt.

> Look at this: he received $69.00 -- that are in evidence as Government's Exhibit 2. The amount taken was $136.00. So the evidence indicates he had $69.00 on him when he was arrested. The amount taken was $136.00. So if in fact none of that money was his, which the government contends, he got more than half of it because Mr. Goldsmith could only have had $67.00." Supplementary Transcript of Trial, p.I.

In rebutting the closing argument of Nero's counsel, the prosecutor restated this point in seeking to refute Nero's defense that he just went along with Goldsmith for the ride:

> " Not only did he go along for the ride he was driving, he got more than half the money the government contends. . ." Supplementary Transcript of Trial, p. R.

Such argument contrary to the only evidence introduced on the point is clearly improper. The prosecutor cannot in his summation misstate the evidence presented at trial. Corley v. United States, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966). As this Court has said:

> "It is elementary, however, that counsel may not premise arguments on evidence which has not been admitted." Johnson v. United States, 121 U.S. App. D.C. 19, 347 F.2d 803, 805 (1965).

This error was prejudicial. Nero's entire case rested upon the jury's belief that he was at most the tail to Goldsmith's dog, that the crime was Goldsmith's idea with which he went along on the assumption that it was a phony robbery. If the jury thought, contrary to the evidence, that Nero had received over half of the proceeds of the offense, it would

not likely believe his description of his limited role and of his absence of intent to rob.

Second, the prosecutor gave his personal opinion of the evidence during his summation. The prosecutor told the jury:

> "I don't think there is any question but what this evidence indicates that Mr. Nero participated in this robbery not only did he participate, from the evidence you can probably draw the inference that he was probably the leader of the robbery attempt." Supplementary Transcript of Trial, pp. H-I.

By casting further improper assertions upon Nero's testimony, the prosecutor further clouded the jury's judgment of that testimony.

The prosecutor may not properly give the jury his personal opinion of defendant's veracity. United States v. Dews, 135 U.S. App. D.C. 185, 417 F.2d 753 (1969). As this Court recently stated:

> "The challenged statements are in essence an opinion of counsel as to the veracity of witnesses in circumstances where veracity may determine the ultimate issue of guilt or innocence. Appellant's testimony is a 'lie' or 'fabrication' only if the jury accepts all of the complainant's testimony and rejects the hypothesis that the claimed third person did intervene and Appellant merely forgot the precise time at which the events in question occurred. Appellant's testimony permitted the prosecutor to ask the jury to consider whether it was implausible, unbelievable, highly suspect, even ridiculous. Many strong adjectives could be used but it was for the jury, and not the prosecutor, to say which witnesses were telling

> the truth. Neither counsel should assert to the jury what in essence is his opinion on guilt or innocence. Yet this is the effect of remarks such as those of the prosecutor here when the accused gives testimony directly conflicting with that of the government's witnesses." (Emphasis supplied.) Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656, 658 (1968).

See also ABA Code of Professional Responsibility DR 7-106(C)(4) providing that a lawyer appearing in his professional capacity before a tribunal not "Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, ... or as to the guilt or innocence of an accused."

CONCLUSION

For the reasons stated above, this Court should vacate Nero's conviction and remand his case to the District Court for a new trial to be conducted without the errors which occurred below and which are described herein. In particular and for the reasons stated in Part V-B, supra, of this Memorandum this Court should order that the proceedings be assigned to a District Judge other than the District Judge who presided over the initial trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,746

UNITED STATES OF AMERICA, APPELLEE

v.

CURTIS NERO, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
EDWIN A. WILLIAMS,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

Cr. No. 723–70

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

418-900—71

OTHER REFERENCES

ISSUE PRESENTED*

In the opinion of appellee, the following issue is presented:

Whether error infected the jury's verdict that appellant was guilty of armed robbery?

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*This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,746

UNITED STATES OF AMERICA, APPELLEE

v.

CURTIS NERO, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed on April 28, 1970, appellant, along with co-defendant Kenneth E. Goldsmith, was charged with armed robbery, robbery and assault with a dangerous weapon. On June 5, 1970, Goldsmith pleaded guilty to robbery before the Honorable John J. Sirica. On July 7 and 8 appellant was tried by a jury before Judge Sirica and found guilty as charged.[1] On September 23, 1970, appellant was sentenced to serve three to ten years for armed robbery and two to six years for assault with a dangerous weapon, the sentences to be served concurrently.[2] This appeal followed.

The evidence at trial established the following:

On February 26, 1969, Henrietta Patten was working at the Miles Long Sandwich Shop located at 1208 Maple View Place, Southeast. About 3:15 a.m. appellant and Kenneth Goldsmith

[1] Since appellant was found guilty of armed robbery, the jury did not consider the robbery count of the indictment.

[2] On September 11 Goldsmith was sentenced to serve one to six years for the robbery charge to which he had pleaded guilty.

entered the store. Goldsmith immediately walked behind the counter where Miss Patten was standing and told her, "This [is] a stick-up" (Tr. 5). Because she knew Goldsmith as a frequent customer, Miss Patten thought he must be kidding and told him so. Goldsmith replied that it was no joke and told her that the man on the other side of the counter had a gun. Miss Patten then looked at appellant, whom she also knew as a customer. In front of him on the counter was a sawed-off shotgun about two feet long.[3] As she looked at him, appellant "took the gun off the counter . . . waved it around and said that if anybody said anything about this I'll kill you" (Tr. 25). Miss Patten was convinced. She removed money from the cash register and put it in a bag. While doing so she set off a burglar alarm by removing a particular bill from the register (Tr. 17). Then, at Goldsmith's direction, she went to the safe and gave him the money from it (Tr. 7). In all, $136.00 was taken (Tr. 29).[4] The robbery lasted from five to seven minutes (Tr. 8), and at its conclusion appellant and Goldsmith walked out the door together (Tr. 15).

Three to five minutes later the police arrived (Tr. 8, 20). Miss Patten related the facts of the robbery and told one of the officers that the man who came behind the counter was named Kenneth. She did not know appellant by name but gave his description to the police (Tr. 8, 54–55; compare Tr. 50–51). Appellant was arrested and searched later the same morning (Tr. 31–35, 54–55). On his person he had $69.00 in cash and a live shotgun shell (Tr. 62–63).

During the course of the Government's case, at the insistence of appellant's trial counsel and with appellant's consent, the jury was informed that Goldsmith had previously entered a plea of guilty to the charge of robbery (Tr. 37–41). At the conclusion of the Government's case appellant's counsel requested that the court grant a motion for judgment of acquittal. The motion was denied (Tr. 67–68).

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[3] Miss Patten testified that she had often seen shotguns and had previously shot them herself (Tr. 6).

[4] Miss Patten said on direct examination that $163.00 had been taken (Tr. 9), although this may perhaps be a typographical error by the court reporter.

Appellant testified in his own behalf. He said that on the night of the robbery he was driving his brother's car, and at about 1:00 a.m. he met Goldsmith. As the two men drove around, Goldsmith told appellant he needed money and suggested that they rob a store. He asked appellant if he had a knife. Appellant replied that he did but that he was "not going in one of them places and get shot" because he was holding a knife (Tr. 81). If he was going to commit a robbery, said appellant, he would want a "better weapon" than a knife (Tr. 97). Goldsmith then suggested that they go to the Miles Long Sandwich Shop. According to appellant, Goldsmith said:

> I go in there everyday and I talk with them and I *feel as though* they will not turn me in . . . . So, he said if I pretend I had—he said he would *tell people that I had a shotgun under my coat* and he would go back there. (Tr. 81) (Emphasis added).

Appellant acceded to this plan. He said that when he entered the store he carried a stick about two feet long and two inches wide (Tr. 82). Goldsmith went behind the counter while appellant waited. There were several customers in the store, some of whom appellant knew and a couple of whom he "had seen before" (Tr. 100, 102). Appellant spoke briefly to one of them (Tr. 84–85, 101–102). A few minutes later he left with Goldsmith, and both men drove away in appellant's brother's car. Goldsmith told appellant that the people in Miles Long would give false descriptions and that they had nothing to worry about (Tr. 85). Appellant drove Goldsmith to within a block of the latter's home, where Goldsmith gave him half or "close to half" of the robbery proceeds—at least $50.00 (Tr. 86, 97).

Appellant admitted that when arrested he had $69.00 on his person. He further admitted that he had a live shotgun shell. Moreover, he conceded that he had recently owned a shotgun but claimed that he sold it in 1968 and kept the shell merely as a "luck piece" (Tr. 87–88). Appellant said that even though he had taken half the proceeds of the crime, he still felt he "didn't do anything wrong" (Tr. 104).

ARGUMENT

Appellant was given a fair trial at which overwhelming evidence established his guilt.

(Tr. 18, 35–36, 50–51, 97, 100–102, 106, 128–130.)

Appellant argues that any of five independent reasons supports a reversal of his conviction. We reject each of those arguments *seriatim*.

Appellant first argues that he was denied due process of law because the trial judge failed to recuse himself from appellant's case after having taken a guilty plea from the co-defendant Goldsmith. That argument verges on the frivolous. In the first place, the argument cannot appropriately be raised for the first time on appeal.[5] In the second place, appellant points to nothing in the record of the trial which might be regarded as symptomatic of bias or prejudice on the part of the trial judge. This failure is compounded when one recognizes that to justify disqualification "alleged bias and prejudice . . . must stem from an extrajudicial source."[6] In the third place, any such bias would not be controlling here where the jury and not the judge determined appellant's guilt.[7] Under such circumstances appellant's claim completely lacks merit. His remedy, if any, lies in isolating and attacking any erroneous decision which may have been made by the judge and not in asserting that unproven bias on the judge's part may somehow have infected the jury's verdict.[8]

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[5] 28 U.S.C. § 144; *see Brotherhood of Locomative Firemen* v. *Bangor & A.R.R.*, 127 U.S. App. D.C. 22, 30, 380 F.2d 570, 577, *cert. denied*, 389 U.S. 227 (1967); *Laughlin* v. *United States*, 120 U.S. App. D.C. 93, 99–100, 344 F.2d 187, 192–194 (1965).

[6] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966).

[7] *Id.* Here, of course, the jury was informed of Goldsmith's prior plea of guilty, but only because of the insistence of appellant's trial counsel (who obviously believed, rightly we think, that this fact corroborated appellant's version of the crime) and with the consent of appellant (Tr. 37–41). *See United States* v. *Harris*, D.C. Cir. No. 23,254, decided November 27, 1970, slip op. at 10–11; *United States* v. *Thompson*, D.C. Cir. No. 22,679, decided May 8, 1970 (unreported); *United States* v. *Kimbrew*, 380 F.2d 538, 540 (6th Cir. 1967).

[8] In this connection appellant asserts, without any support in the record, that the court's unwillingness to give an instruction on grand larceny as a lesser included offense of robbery was somehow related to the court's recol-

Unable to make even a colorable claim of biased trial rulings by the District Judge, appellant speculates, again with absolutely no support in the record,[9] that the court imposed a heavier sentence on appellant than on his co-defendant Goldsmith solely because appellant elected to take advantage of his right to trial by jury. To the contrary the disparity between sentences indicates that the District Judge gave individualized consideration to each defendant, neither of whom received a sentence even close to the maximum (life imprisonment) provided by law (22 D.C. Code § 3202). In this connection it will be recalled that it was appellant who carried the shotgun and threatened to kill anyone in the store who had sufficient courage to report the robbery accurately. We note too that, appellant's assumption notwithstanding, a judge is not required to make an affirmative showing of reasons for giving different sentences to defendants in the same case.[10] The simple fact is that not a scintilla of record evidence supports any of appellant's speculations, and his contentions should therefore be given no consideration by this Court.

Appellant next complains that the trial judge erred in refusing to give either a missing witness instruction or an instruction on grand larceny. Neither contention is meritorious.

The District Judge's refusal to grant the missing witness instruction was entirely appropriate in that appellant made absolutely no attempt to establish either that the witnesses in question were "peculiarly" available[11] to the Government or that, if produced, their testimony would have been anything

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lection of facts recited at the time Goldsmith pleaded guilty (appellant's brief, p. 20). Acceptance of this argument would make a mockery of the accepted rule that, in the absence specific of evidence to the contrary, a trial judge is presumed to have acted correctly. *See, e.g., Fennell* v. *United States*, 116 U.S. App. D.C. 62, 320 F.2d 784 (1963).

[9] The sentencing procedure which this court found deficient in *Scott* v. *United States*, 135 U.S. App. D.C. 377, 419 F. 2d 264 (1969), is in no way analogous to anything in the record of this case.

[10] *United States* v. *Melendez*, 355 F. 2d 914 (7th Cir. 1966); *Ellis* v. *United States*, 321 F. 2d 931 (9th Cir. 1963).

[11] *Graves* v. *United States*, 150 U.S. 118, 121 (1894); *Wynn* v. *United States*, 130 U.S. App. D.C. 60, 397 F.2d 621 (1967).

more than cumulative.[12] The failure to establish either of these factors is fatal to appellant's claim. The record clearly shows that neither was established and therefore provides sufficient answer to appellant's argument (Tr. 18, 35–36, 50–51, 100, 102, 106).[13]

Appellant's contention that the evidence justified a grand larceny instruction is equally without foundation. Initially we are compelled to observe that appellant's counsel ultimately stated he had no objection to the instructions as given (Tr. 97, 128–130). That should end the matter.[14] In any event, carrying a stick the size of a shotgun with the intent of having the individuals present *believe* that it was a gun would constitute robbery by fear.[15] On the other hand, if appellant and Goldsmith were merely aiding and abetting Henrietta Patten to make away with funds entrusted to her care by virtue of her employment at the sandwich shop, then appellant was guilty not of larceny but of embezzlement.[16] In sum, under any theory as to the import of appellant's testimony, a larceny instruction would have been inappropriate.

Appellant next complains that the prosecutor's final argument was prejudical, either because it misrepresented the evidence or because it expressed the prosecutor's personal opinion

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[12] *Brown* v. *United States*, 134 U.S. App. D.C. 269, 270–271 & n. 12, 414 F.2d 1165, 1166–1167 & n. 12 (1969), citing *Morton* v. *United States*, 79 U.S. App. D.C. 329, 332 n. 11, 147 F.2d 28, 31 n. 11, *cert. denied*, 324 U.S. 875 (1945).

[13] We submit in addition that, given Henrietta Patten's prior knowledge of appellant and her unimpeached testimony coupled with appellant's incredible version of the event, any error in this regard would have been harmless. *Kotteakos* v. *United States*, 328 U.S. 750 (1945); *cf. Brown* v. *United States*, *supra* note 12.

[14] Rule 30, *Fed. R. Crim. P.*; *see Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

[15] The record shows that three other waitresses were present (Tr. 18). Presumably *all* of them were not part of this plan. Thus the appearance of the gun would have been necessary to frighten them into acquiescence even if Henrietta Patten were part of the conspiracy. *Cf. United States* v. *Daniels*, D.C. Cir. No. 22,913, decided October 15, 1970. *Cf.* Tr. 81, quoted *supra*, p. 3.

[16] *Miller* v. *United States*, 41 App. D.C. 52, 67–68 (1912), *cert. denied*, 231 U.S. 755 (1913); *Woodward* v. *United States*, 38 App. D.C. 323, 332–333 (1912); *Rohde* v. *United States*, 34 App. D.C. 249, 255–256 (1910).

or both (appellant's brief, pp. 29–32). Suffice it to say that the language quoted in appellant's brief clearly establishes that the prosecutor spoke to the jury only in terms of the inferences which they might draw from the evidence which was presented. Such argument is entirely appropriate. In any event, in the absence of objection it can hardly constitute plain error requiring reversal.[17]

Finally appellant argues that the trial court committed plain error by sending a copy of the indictment into the jury room. That argument is patently frivolous. Appellant admits first that whether to follow such a course is within the discretion of the trial judge, and second that the jury was properly instructed that the indictment did not constitute evidence (appellant's brief, p. 26). The fact that Goldsmith was named in the indictment can be of little significance here, since appellant's own testimony was that he was with Goldsmith and that Goldsmith took the money and later shared it with him. We see no imaginable prejudice here.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[17] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Stevenson*, 138 U.S. App. D.C. 10, 424 F.2d 923 (1970); *Harris* v. *United States*, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968); *cf. Jones* v. *United States*, — U.S. App. D.C. —, 433 F.2d 1107 (1970).

U.S. GOVERNMENT PRINTING OFFICE:—1971

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,746 September Term, 1970

United States of America Criminal 723-70

v.

Curtis Nero,

Appellant

APPELLANT'S REPLY BRIEF

There is one element of the Government's Brief that especially requires reply. If Appellant Nero urged, inter alia, in his brief that the Court below erred in refusing to charge the jury that it could convict him of a lesser included offense. In seeking to meet this point, the Government argued: "Initially we are compelled to observe that appellant's [trial] counsel ultimately stated he had no objection to the instructions as given. (Tr. 97,128-130). That should end the matter." (footnote omitted.) Brief, p.6. Thus, the Government would have the Court dismiss this part of Nero's appeal for failure to raise or press it firmly below.

The Government's assertions to the contrary notwithstanding, the transcript makes it abundantly clear that Nero's counsel below most vigorously argued that Nero was entitled to the lesser offense charge. At the beginning of the second and final day of the trial, Nero's counsel argued the issue on the record. Only after the Trial Judge said: "I will deny your motion. You are protected on the record" did Nero's counsel cease advocating the propriety of the requested charge. Transcript, pp. 89-91. That counsel did not raise this point again a few moments later, Transcript, p. 92, or at the close of the judge's instructions to the jury that day, Transcript, pp. 128 - 130, clearly in no way constitutes a waiver of that point. Indeed, to have pressed on, in light of the Court's ruling would

have been improper. See ABA Code of Professional Responsibility, Ethical Consideration 7-22 (Final Draft, 1969). As the Trial Judge stated, "I will deny your motion. You are protected on the record." (emphasis supplied.) Transcript, p. 91.

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